Filed 11/3/10 P. v. Hernandez CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDWARD VINCENT HERNANDEZ et al., Defendants and Appellants.	E047603 (Super.Ct.No. FSB053198) OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and Appellant Edward Hernandez.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant Edward Vincent Hernandez.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez, James

H. Flaherty III, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Edward Vincent Hernandez (Vinny)[1] appeals from his conviction of first degree murder (Pen. Code,[2] § 187, subd. (a) – count 1) and conspiracy to commit murder (§ 182, subd. (a) – count 2) and from the true findings on allegations as to count 1 that he personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and used a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). He contends the evidence was insufficient to establish his personal use of a firearm beyond a reasonable doubt. We agree, and we reverse the true finding on the enhancements and remand for resentencing on a lesser included enhancement under section 12022, subdivision (a)(1).

Defendant Edward Hernandez (Edward) appeals from the imposition of a $5,000 victim restitution order following entry of his plea of guilty to acting as an accessory to a felony (§ 32). He contends the order violated the Sixth Amendment and the holdings of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely v. Washington*

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[1] Defendants, who are father and son, have the same first and last names. For clarity, defendant Edward Vincent Hernandez will be referred to as Vinny, and defendant Edward Hernandez will be referred to as Edward. Similarly, the victim and other defendants and witnesses who have identical last names will be referred to by their first names.

[2] All further statutory references are to the Penal Code.

(2004) 542 U.S. 296 (*Blakely*), because the facts on which the order was based were not admitted or found by a jury. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

Prior Trial

Vinny, Edward, and codefendants Alfred Rodriguez (Rodriguez) and Benjamin Hernandez (Benjamin)[3] were all charged with the murder of Jerry Ramirez (Jerry), with various weapon use enhancements and with conspiracy to commit murder. Vinny's trial was severed from that of his codefendants, and a trial was held as to the other three defendants. In that trial the jury acquitted Edward of conspiracy to commit murder but deadlocked on the murder count, and the trial court declared a mistrial as to that count. The People moved to join Edward's case with that of Vinny and the trial court granted the motion.

Current Trial

Benjamin's daughter, Tina Lopez, had dated Jerry for about two years. On November 18, 2005, Tina called her father and asked him to pick her up at the motel room she had shared with Jerry the previous night. Benjamin sent Tina's cousins, Vinny and Rodriguez, to pick her up.

The group drove to the home of Tina's aunt, with whom Jerry's brother, Eric Ramirez, lived. Inside the house, Jerry asked Eric for guns that Eric had been holding for

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[3] In a separate trial, Rodriguez and Benjamin were each found guilty of second degree murder, and the jury found true the allegation that Benjamin had personally used a deadly weapon, a shovel, during the commission of the murder. (§ 12022, subd. (b)(1).)

him, and Eric gave Jerry a .22-caliber revolver and a .22-caliber semiautomatic. Jerry handed the unloaded semiautomatic and a .25-caliber clip of bullets to Vinny. Eric testified that the semiautomatic and the clip belonged to Vinny. About a year before November 2005, Vinny had told Eric he had a "strap," meaning a gun. A few months before November 2005, Vinny had shown Eric a 12-gauge shotgun and a .25-caliber handgun.

Rodriguez, Jerry, Vinny, and Tina drove to a house on East Pumalo Street (the Pumalo house) where Tina's cousin, Michelle Hernandez, lived with her parents, Edward and Ruth Hernandez. Stella Lopez, Tina's mother, and Edward's brother, Benjamin, were also there. Jerry, Vinny, and Rodriguez walked to the backyard. Benjamin brought Tina into the kitchen, where they bickered. Tina heard "commotion" in the backyard and tried to go there, but Benjamin pushed her into the house and told Stella to keep her there. Benjamin went back outside, and the commotion continued.

Vivian Jackson, who lived next door to the Pumalo house, heard someone fighting and heard a person say, "I told you not to 'F' with me." She looked through the chain-link fence and saw four men, three of whom were beating up another person on the ground. Benjamin struck the victim with a shovel at least twice, and two others were kicking and hitting the victim. Jackson left the area, and 15 or 20 minutes later, she saw Edward using a hose to wash down what looked like blood on the ground.

Alberta Hechtl, a security guard at a credit union adjacent to the Pumalo house, heard yelling on the other side of the block wall that separated the properties. She saw a shovel going up and down at least six or seven times, and she then heard screaming as if

someone was in pain. She saw the back door of the Pumalo house open and heard a woman screaming. A man told the woman to get back in the house. Hechtl saw Vinny back a maroon car up the driveway.

Curtis Hawkins, who lived in an apartment behind the Pumalo house, heard Benjamin say, "You have been fucking with my family," and "I am going to kill you." He looked out his bathroom window and saw the four defendants and another man near a car under the carport. The four defendants were blocking the fifth man so he could not run away. Hawkins saw Benjamin hit the victim, who was then on the ground, about 20 times with a shovel, while the other defendants stood around. Benjamin said, "Get my gun," and "Get the blankets." The victim was not moving, and Hawkins saw blood on the ground. A burgundy car backed up the driveway. Vinny and Rodriguez put some blankets on the ground, picked up the victim, and wrapped his entire body, including his head, in the blankets. They put the body into the trunk of the car, and Vinny drove away with Rodriguez in the passenger seat. Edward started cleaning off the car in the carport with a hose and then put dirt on the spot where the blood was.

On November 20, 2005, Jerry's body was found on a hillside off Old Waterman Canyon Road, a six- to 10-minute drive from the Pumalo house. Jerry had suffered multiple blunt force and sharp force injuries, which could have been inflicted by a shovel, and he had been shot seven times in the head at close range. Any one of the gunshot wounds could have been fatal. Jerry had been alive when he was shot. All the bullets were .25-caliber and were probably from the same manufacturer. The bullets had almost

certainly been fired from a .25-caliber semiautomatic weapon. No gun, shovel, or blankets were ever located.

Defense Case

Stella testified that Edward and Ruth had been painting a bedroom in the Pumalo house when Benjamin went outside, and the couple was still in the bedroom when the maroon car drove away. Later, Stella saw Edward washing off paint brushes and rinsing a car in the carport; she did not see any blood.

Verdicts, Edward's Guilty Plea, and Sentences

The jury found Vinny guilty of first degree murder (§ 187, subd. (a) – count 1) and conspiracy to commit murder (§ 182, subd. (a) – count 2). The jury found true the allegations as to count 1 that Vinny personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and used a firearm, causing great bodily injury and death (§ 12022.53, subd. (d)). The trial court sentenced him to 25 years to life for the murder and a consecutive 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). The trial court stayed his sentences for the conspiracy conviction and for the additional enhancements under section 654.

The jury deadlocked on the murder charge against Edward, and the trial court declared a mistrial. Pursuant to a negotiated agreement, Edward entered a plea of guilty to one count of accessory after the fact. (§ 32.) The trial court sentenced him to the aggravated term of three years. The trial court also imposed a $5,000 victim restitution order.

Additional facts are set forth below as relevant to the discussion of the issues.

III. DISCUSSION

Sufficiency of Evidence of Vinny's Personal Firearm Use

Vinny contends the evidence was insufficient to support the jury's true finding on the personal firearm use allegations. (§ 12022.53, subds. (b)-(d).)

Additional Factual Background

The evidence showed that on November 18, 2005, Jerry and Vinny went to the home of Jerry's brother, Eric ,and Jerry asked Eric for guns Jerry had left there. Both guns were .22-caliber; one was a revolver, and one was a semiautomatic with a clip. Eric gave the guns to Jerry, who unloaded the semiautomatic and handed it to Vinny. In addition, Jerry gave Vinny a .25-caliber clip. Eric testified the clip and the .22-caliber semiautomatic belonged to Vinny.

Eric testified that Vinny and Jerry did not get along, and about a year before the murder, Eric, Vinny, and Jerry had had a fistfight. A few months before November 2005, Vinny had shown Eric his guns, including a .25-caliber handgun.

Hawkins heard Benjamin say, "Get my gun," while Jerry was being beaten. Seven .25-caliber bullets were recovered from Jerry's head, and a criminalist testified that the rounds had almost certainly been fired from a .25-caliber weapon.

Analysis

Personal firearm use is an element of each of the allegations under section 12022.53, subdivisions (b) through (d).

In *People v. Rener* (1994) 24 Cal.App.4th 258, there were two defendants, but only one gun was seen, and it was in the possession of the codefendant. On appeal, the court held that the evidence was insufficient to establish that defendant Rener had personally used the firearm, even though he had threatened to shoot one of the victims. (*Id.* at pp. 260-262.) We find *Rener* distinguishable. In the present case, there was evidence that several months earlier Vinny possessed a gun of the same caliber used in the shooting. In addition, Vinny received a clip in that caliber the morning of the shooting. Finally, there was a history of bad blood between Vinny and Jerry.

In *People v. Allen* (1985) 165 Cal.App.3d 616, the evidence placed two defendants in the kitchen where the victim was shot with a .32-caliber bullet. Both defendants were armed. One witness testified defendant Allen had shot into the bedroom and defendant Brewer had shot into the bedroom closet. The bullet recovered from the bedroom was not a .32-caliber. On appeal, the court concluded that, even assuming each defendant possessed a single weapon, and "the bullet found in the bedroom did not ricochet out of the closet," this "slight circumstantial evidence" was insufficient to prove that Brewer personally discharged the gun into the murder victim. (*Id.* at pp. 626-627.) The court reasoned that "the crimes were the product of an assassination-type murder plot involving the elimination of multiple witnesses, . . ." (*ibid.*), and it could not be "lightly presumed" that the two assassins approached their task each possessing a single gun. (*Ibid.*) Thus, the court concluded, the evidence did not support a true finding on the weapon use enhancement as to *either* defendant. (*Id.* at p. 627.)

We also find *Allen* distinguishable because the evidence showed that Vinny owned a .25-caliber handgun, albeit approximately three months before the murder. As noted above, Vinny received a .25-caliber clip that morning, and he had had a fistfight with Jerry about a year earlier. We therefore affirm the true findings on the firearm enhancements.

Validity of Restitution Fine

Edward contends the trial court erred in ordering him to pay $5,000 to the Victim Compensation Board. Edward argues that the order violated the Sixth Amendment and the holdings of *Apprendi*, *supra*, 530 U.S. 466 and *Blakely*, *supra*, 542 U.S. 296, because the facts on which the order was based were not admitted or found by a jury.

Additional Factual Background

Following two mistrials on the murder charge, Edward entered a plea of guilty to accessory to a felony (§ 32.) The trial court indicated it had heard the trial and there was a factual basis for the plea. Edward affirmed he understood that "[a]ctual restitution, if any, must be ordered as well," and Edward initialed a *Harvey*[4] waiver stating that restitution would be ordered as to the dismissed counts.

Edward's trial counsel thereafter filed a written opposition to restitution, stating that the defense "did not agree to such a restitution order as part of the underlying plea agreement," and the trial court "did not retain jurisdiction to order such restitution." The

[4] *People v. Harvey* (1979) 25 Cal.3d 754.

opposition to restitution was not based on a violation of Edward's Sixth Amendment rights.

At the restitution hearing, the trial court noted that in his plea agreement, Edward had initialed "a *Harvey* waiver that says 'restitution as to dismissed counts.'" Defense counsel argued that the trial court should not order Edward to pay victim restitution because he was "substantially less culpable" than his codefendants. The trial court observed that, although it might not have ordered restitution based on Edward's plea to a violation of accessory after the fact, there was "support in the plea bargain . . . for total restitution." The trial court awarded "restitution, joint and several, with the codefendants in the amount of $5,000, to be collected during the term of parole."

Forfeiture

The People contend that because Edward did not object to restitution in the trial court on the basis of a Sixth Amendment violation, he has forfeited that issue. Nonetheless, because the People have addressed the issue on the merits, we will do the same.

Application of Apprendi and Blakely

The United States Supreme Court has held, "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker* (2005) 543 U.S. 220, 244.) The Court has defined the statutory maximum as "'the

maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*' [Citation.]" (*Id.* at p. 221.)

As yet, the California Supreme Court has declined to address whether the *Apprendi* and *Blakely* principles apply to victim restitution orders. (See *People v. Giordano* (2007) 42 Cal.4th 644, 662, fn. 6.) However, in *People v. Millard* (2009) 175 Cal.App.4th 7, the Court of Appeal ruled that the trial court's statutory duty to award victim restitution does not implicate a defendant's Sixth Amendment right to a jury trial or proof beyond a reasonable doubt. The court explained that "section 1202.4's requirement that a trial court issue an order providing for full restitution of a victim's economic losses does not constitute a sentencing choice by the trial court. Rather, because that statute requires the court to award the victim full restitution, the court's determination of that amount in a restitution hearing by a preponderance of the evidence does not involve a defendant's Sixth Amendment right to a jury or proof beyond a reasonable doubt." (*People v. Millard*, *supra*, at p. 36; accord *People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1183-1184.)

Similarly, federal courts have consistently held that the *Apprendi* and *Blakely* principles do not apply to victim restitution orders. (See, e.g., *United States v. Leahy* (3d Cir. 2006) 438 F.3d 328, 337, 339, fn. 12, and cases cited (*Leahy*); *United States v. Sosebee* (6th Cir. 2005) 419 F.3d 451, 461-462, and cases cited.) In *Leahy*, the court observed that under the controlling federal restitution statutes, "when a defendant is convicted of certain specified offenses, restitution is authorized as a matter of course 'in the full amount of the victim's losses.' [Citation.]" (*Id.* at p. 337.) The court reasoned

that the district court may not order restitution in excess of the full amount of the loss, and "[t]hough post-conviction judicial fact-finding determines the amount of restitution a defendant must pay, a restitution order does not punish a defendant beyond the 'statutory maximum' as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence." In other words, a restitution order for the amount of the loss cannot, by definition, exceed the statutory maximum defined under the penalty statutes. (*Leahy, supra,* 438 F.3d at pp. 337.)

Edward argues that the dissent in *Leahy* is better reasoned than the majority opinion in that case (and, by inference, better reasoned than the myriad of federal and state opinions that have agreed with the *Leahy* majority). We are unpersuaded.

Although a restitution fine may be considered a form of punishment, a victim restitution order generally is not unless, "in a specific procedural context, its imposition produces severe consequences or a serious effect." (*People v. Young* (1995) 38 Cal.App.4th 560, 569 [upholding victim restitution in the amount of $19.507.53].) Here, Edward has made no showing of "severe consequences or a serious effect." We conclude that under the circumstances, the victim restitution order was not a "penalty for a crime" within the meaning of *Apprendi* and *Blakely,* and Edward did not have a constitutional right to a jury trial on issues of restitution.

IV. DISPOSITION

The judgments are affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

MILLER
J.